UNITED MALAYAN BANKING CORP BHD

v.

SIN CHAI CHONG

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[PETITION NO: 24-48-1991]
26 JULY 1997

LAND LAW: *Charge - Notice of demand - Form 16E - National Land Code 1965, s. 255 - Order for sale - Whether any cause to the contrary shown - National Land Code 1965, s. 256(3)*

LIMITATION: *Accrual of cause of action - Charge - Action for order for sale of charged land - Commencement of action - When action commenced - Land, recovery of - 'On demand' provisions in the charge annexure - Commencement of limitation period - Whether action time barred - Limitation Act 1953, s. 21(1)*

The plaintiff bank ('the bank') granted a loan to one Dato' Sin Choo Ming (since deceased) ('the borrower') secured by a third party charge executed by the chargor Low Sam Lan (deceased) in favour of the bank over a piece of land in Kota Bharu. The charge was duly registered with the Registrar of Land Title Kelantan.

The annexure to the memorandum of charge showed that the chargor "agrees, covenants and undertakes with the plaintiff bank to pay on demand all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the said Dato' Sin ..." The borrower had defaulted in making repayment of the loan since June 1977. The solicitors for the bank issued a notice of demand to the borrower for payment of the principal together with the accrued interest but no response was received from the borrower.

On 27 October 1990, the solicitors for the bank sent a Form 16E by AR registered post to the defendant as administrator of the estate of Low Sam Lan seeking to recall payment of the principal sum from the defendant. The said Form 16E was received by the addressee on 28 October 1990. Since no payment was effected, the bank filed an originating summons in February 1991 praying for an order for sale of the charged land.

In his affidavit in reply, the defendant opposed the application on the ground that the bank was barred by the terms of the Limitation Act 1953 ('the Act')

from instituting the action. Counsel for the defendant submitted that "the date when the right to receive the money accrued" as stipulated in s. 21(1) of the Act should date back to the date of the last transaction on the account, ie, sometime in June 1977; and since the action was filed in February 1991, the action was statute barred and hence no cause of action against the defendant existed. Counsel for the defendant contended that if the defence of limitation was available, then the defendant had succeeded in satisfying the court of the existence of a cause to the contrary as stipulated in s. 256(3) of the National Land Code 1965 ('the Code') and the order for sale should not be made.

Held:

[1] The case of *OCBC v. Philip Wee Kee Puan* which was relied on by counsel for the defendant could be distinguished from the instant case on the facts and on the law. That case dealt with s. 6 of the Act unlike in the instant case where the relevant section was s. 21 of the Act which differed materially on the commencing date of accrual of the cause of action. Furthermore, the annexure to the memorandum of charge showed that the chargor "agrees and undertakes with the bank to pay on demand all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the customer (Dato' Sin Choo Ming) either solely or jointly.

[2] In the instant case, for the purpose of s. 21 of the Act, the date when the right to receive the money accrued would be the date of service of Form 16E viz, 28 October 1990.

[3] As for the service of the notice of demand – Form 16E – there was no provision in s. 21 of the Act requiring it to be served within the period of limitation, and the fact that there was such a delay did not deprive or extinguish the right of the bank from receiving payment of the principal sum. It would only amount to such right being held in abeyance until such time when the notice of demand would be sent though it might give rise to the question of laches. As the question of laches was not taken by the defendant, this point need not be discussed here.

[Defendant's objection dismissed; order for sale issued.]

Cases referred to:
OCBC v. Philip Wee Kee Puan [1984] 2 MLJ 1 (PC) ***(refd)***
Lloyd Bank Ltd v. Margolis & Ors [1954] 1 All ER 734 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 21
Limitation Ordinance 1953, s. 6
National Land Code 1965, ss. 254, 255, 256(3)

For the plaintiff - Razalli Hasan; M/s Hassan & Co
For the defendant - Amir Mohd Zain; M/s Amir Rohana & Khairuddin

JUDGMENT

Idris Yusoff J:

The plaintiff bank granted a loan of RM100,000 to one Dato Sin Choo Ming (since deceased). The loan was secured by the chargor Low Sam Lan (deceased) executing a third party charge in favour of the plaintiff bank over a piece of land known and identified as Lot No. 271 (Grant No. 10847) Section 16 Kota Bharu town. The said charge was registered with the Registrar of Land Title Kelantan, Kota Bharu on 21 June 1977 *vide* Charge No. 213/77 and Presentation No. 687/77 – see exh. 'A' to the affidavit sworn by Tengku Abdul Samad bin Tengku Abdul Hamid (the said affidavit).

The annexure to the memorandum of charge – exh. 'HZK' showed that the chargor "agrees, covenants and undertakes with the plaintiff bank to pay on demand all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the said Dato Sin Choo Ming solely or jointly with any other person, firms or companies and whether as principal or surety or which the said Dato Sin Choo Ming may be or become liable to the bank up to an aggregate sum of RM100,000 with interest thereon at the rate of 11% per annum (variable from time to time) with monthly rests".

It seemed that the borrower had defaulted in making repayment of the loan since June 1977 and this had led to the solicitors for the plaintiff bank to issue the usual notice of demand dated 27 March 1984 giving the borrower 14 days to come up with payment of the sum of RM127,396.99 as at 26 February 1984 together with interest accrued thereon at the rate of 14% per annum –see exh. 'B' to the said affidavit.

However, there was no response to the said demand and the plaintiff bank's solicitors then on 27 October 1990 sent Form 16E dated 24 October 1990 by A.R. Registered post to the defendant as administrator of the estate of Low Sam Lan, the deceased chargor. The said Form 16A was received by the addressee on 28 October 1990 – see exhs. 'C' and 'D' to the said affidavit. Form 16E served to recall payment of the principal sum from the defendant amounting to RM289,438.30 calculated up to 31 October 1990.

Since no payment was effected the plaintiff bank filed an originating summons on 17 February 1991 praying for an order for sale of the charged land. An affidavit-in-support was also filed. The defendant had put up an affidavit-in-reply as per Encl. (7) – opposing the application on two grounds:

(i) The validity of the memorandum of charge as it was registered after the death of the chargor and

(ii) The plaintiff bank was barred by the terms of the Limitation Act 1953 to institute this action.

When the application came up for hearing before me counsel for the defendant indicated that he wished to abandon ground (i) and would only proceed on the second ground.

Section 256(3) of the National Land Code says that on the application of the chargee, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary and it, was the contention of counsel for the defendant that if the defence of limitation was available, the defendant had succeeded in satisfying the court the existence of such a cause.

It was common ground that the relevant section in the Limitation Act was s. 21(1) and the section reads:

> No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property **after the expiration of twelve years from the date when the right to receive the money accrued.** (emphasis added)

It was submitted by counsel for the defendant that "the date when the right to receive the money accrued" should date back to the date of the last transaction on the account ie, sometime in the month of June 1977 (exact date could not be ascertained as nowhere had it been stated) and since the action was filed on 7 February 1991 – some 14 years 2 months after the date when the alleged right to receive the money accrued the action was therefore statute barred and hence no cause of action against the defendant existed. The case of *OCBC v. Philip Wee Kee Puan* [1984] 2 MLJ 1 (PC) was cited in support of the defence contention. In that case the judge held that for the purpose of s. 6 of the Limitation Ordinance 1953 time began to run from the date when the account became dormant, ie, the date of the last transaction on the account and the claim was therefore statute barred but nevertheless His Lordship gave judgment in favour of the plaintiff in view of the letter (P7) sent by the defendant requesting postponement of the hearing of the plaintiff's originating summons No. 109/73 (application for order for sale) pending settlement.

On appeal to the Federal Court, the High Court decision was reversed on the ground that P7 constituted a new cause of action and that being the case, it should have been pleaded by the plaintiff. Since it was not so pleaded the decision of the High Court was not allowed to stand – see [1982] 1 MLJ 64.

However being dissatisfied with the said decision the plaintiff bank appealed to the Privy Council which resulted in the reversal of the decision of the Federal Court. However the Privy Council felt it was not necessary to express an opinion on the date of accrual of the cause of action though that point was fully canvassed before the court. In the result counsel for the defendant maintained that in such event the decision of the High Court in regard to the date of accrual of the cause of action ought to stand. With respect the *OCBC* case was distinguishable on facts and on law. In that case the High Court held that the claim was statute barred by virtue of s. 6 of the Limitation Ordinance, unlike in the instant case where the relevant section in the Limitation Act was s. 21 which differed materially on the commencing date of accrual of the cause of action and furthermore the annexure to the memorandum of charge showed that the chargor "agrees and undertakes with the plaintiff bank to pay on demand all sums of money which are now or shall from time to time or at any time hereafter be due or owing by the customer (Dato' Sin Choo Ming) either solely or jointly ..." In *Lloyd Bank Ltd v. Margolis and Ors.* [1954] 1 All ER 734, the court held that on the true instruction of the legal charge the making of a demand was a condition precedent to recovery of the money secured thereby and therefore time ran from the date of the demand and the claim was not barred. The facts in that case were that on 16 September 1936 a bank took a legal charge (subject to a prior mortgage) secured on a farm owned by A as security for A's overdraft on current account. The charge provided that A "hereby covenants with the bank to pay to them on demand all money and liabilities which now are or at any time hereafter may be due owing or incurred from or by A to the bank". On 19 December 1938 the bank gave notice in writing to A pursuant to the legal charge requiring payment of the money due on his bank account. On 29 November 1950 the bank issued an originating summons to enforce its security on the farm by foreclosure or sale. It was objected to on the ground that the claim was statute barred but the court held otherwise.

It would also be of relevance to advert to the judgment of the Federal Court in *OCBC* case *(supra)* at p. 65 para. 2 of the 2nd column which said:

> It is settled law that for the purpose of the statute of limitation as regards overdraft the cause of action against the borrower arises everytime an advance is made by the bank and that no demand for repayment of debt is necessary for the accrual of the cause of action, **unless there is a term in the overdraft**

agreement requiring such notice – *Parr*'s *Banking Co. Ltd. v. Yates* [1898] 2 QB 460, *Bian Chiang Bank Bhd v. Kwong Hing Cheong* [1978] 2 MLJ 193. **On the other hand the cause of action against a person who stood as a surety for an overdraft facility only accrues when a demand for repayment is made to the surety**. *Bradford Old Bank Ltd. v. Sutcliffe* [1918] 2 KB 833. (emphasis added) – see also *Kong Ming Bank Bhd. v. Sim Siok Eng* [1982] 2 MLJ 205 (PC)

In the circumstances, I held that in the instant case, for the purpose of s. 21 of the Limitation Act 1953 the date when the right to receive the money accrued would be the date of service of Form 16E *viz:* 28 October 1990.

Counsel for the defendant further submitted that the plaintiff bank apparently relied on the issue of "demand" and not on "default of payment". He argued that the demand was specially catered for and required to be made if related to the account of the borrower and not to serve as a notice to foreclose since foreclosure proceedings did not require any demand as a pre-requisite.

In reply counsel for the plaintiff bank submitted that the application for the order for sale was made pursuant to the security furnished by the chargor and the relevant section was s. 255 of the National Land Code and as a prelude to such proceedings, there ought to be served a notice of demand in Form 16E. The notice was duly served on the defendant, the effect of which was to recall the principal sum and the present application, by way of originating summons, was filed after receiving no response from the defendant.

Counsel for the defendant in his reply to the submissions of counsel for the plaintiff bank seemed to change his stance when he argued that s. 255 of the National Land Code was only procedural in nature and thus did not absolve the plaintiff bank from serving the notice within the statutory limitation period but Form 16E was only dated 24 October 1990 – some 13 years 4 months after the date of the last transaction on the account. In fact counsel went on to the extent of saying that the application should have appropriately been made under s. 254 and not 255 of the National Land Code. With respect I did not agree for there was no conflict between ss. 254 and 255 – in the former the chargor was required to remedy the breaches while in the latter the chargee was recalling payment of the principal sum. In both instances they would end up with applications for orders for sale should there be no heed from the chargor.

As for service of the notice of demand – Form 16E – I noted that there was no provision in s. 21 requiring it to be served within the period of limitation and the fact that there was such a delay did not deprive or extinguish the right of the plaintiff bank from receiving back payment of the principal sum.

It would only amount to such right being held in abeyance until such time when the notice of demand would be sent though it might give rise to the question of laches. However, as the question of laches was not taken by the defendant chargor, I refrained from discussing it.

Accordingly I dismissed the defendant's objection with costs and also made an order for the issue of the order for sale as applied for.

Reported by Ling Hea Hoon

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